QUESTION PRESENTED

Whether the court of appeals correctly held that the constitutionality of regulations and policies governing content-based censorship of publications mailed by publishers to individual federal prisoners should be evaluated under the First Amendment standard established in *Procunier v. Martinez*, 416 U.S. 396 (1974) so that the district court on remand should determine (1) whether important and substantial governmental interests in security, order and rehabilitation are furthered by the prison regulations and practices at issue; and (2) whether the limitations of First Amendment freedoms are no greater than necessary or essential to protect the particular governmental interest involved?

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IN THE

Supreme Court of the United States

October Term, 1988

No. 87-1344

RICHARD L. THORNBURGH, Attorney General of the United States, et al.,

Petitioners,

v.

JACK ABBOTT, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This case presents a partial challenge to the publications censorship policy of the federal Bureau of Prisons, under which prison censors have rejected such publications as: an issue of *WIN Magazine* [Workshop In Nonviolence], containing an article critical of the federal prison industries program (J.L. 52-88);[1] *The David Kopay Story* (Bantam Books, 1977), the

[1] "J.L." refers to the Joint Lodging; "P.A." refers to Petitioner's Appendix on Writ of Certiorari; "C.A." refers to the Appendix in the Court of Appeals; "Jt.A." refers to the Joint Appendix; "T." refers to pages of the trial transcript; "Dep." refers to the depositions which were admitted into evidence (T. 1548, 1551) [where no other record references are available]; "Adm." refers to the Defendants' [Petitioners'] Response to Plaintiffs' Requests for Admissions.

autobiography of a professional football player who is a homosexual (Respondents Lodging; P.Exh. 83); an issue of *Labyrinth* magazine (J.L. 18) that criticizes medical care at the Terre Haute penitentiary based on events discussed in *Carlson v. Green*, 446 U.S. 14, 16 n.1 (1980); an issue of *The Call*, describing the Control Unit of the Marion penitentiary as a "hell hole" and reporting the filing of a lawsuit that later resulted in findings of Eighth Amendment and due process violations. (J.L. 7; P.A. 18a).[2]

Respondents, a class of federal prisoners and several publishers whose written materials have been censored, challenge portions of the censorship policy on its face and as applied to 46 specific books and publications. (J.L. 1-3).

A. The Administrative Censorship Scheme

As aptly described by the district court, the censorship policy confers "broad discretion" on the warden of each institution (P.A. 29a), who is empowered to bar any book or periodical deemed "detrimental to the security, good order or discipline of the institution, or if it might facilitate criminal activity." 28 C.F.R. §540.71(b) (P.A. 22a). The scope of the warden's authority is indicated by seven illustrative guidelines set forth in the Bureau's regulations. 28 C.F.R. §540.71(b)(1)-(7) (P.A. 22a-23a). The district court found that the warden's discretion was not "appreciably limited" by these non-exhaustive guidelines (P.A. 29a), four of which are also challenged in this lawsuit as vague and overbroad. They allow a warden to reject a publication if:

[2]*See Bono v. Saxbe*, 450 F.Supp. 934 (S.D. Ill. 1978), aff'd in part and remanded on other grnds, 620 F.2d 609 (7th Cir. 1980).

— "It depicts...or describes methods of escape from correctional facilities..." 28 C.F.R. §540.71(b)(2);

— "It depicts, [or] describes...activities which may lead to the use of physical violence or group disruption," 28 C.F.R. §540.71(b)(5);

— "It...instructs in the commission of criminal activity," 28 C.F.R. §540.71(b)(6);

— "It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity," 28 C.F.R. §540.71(b)(7).[3]

In the district court, respondents challenged the Bureau's use of the word "encourages" in guidelines (b)(2), (b)(5), and (b)(6). That challenge is no longer being pressed in light of the decision below construing the word "encourage" as used in the guidelines to be consistent with this Court's decision in *Procunier v. Martinez*, 416 U.S. 396 (1974). (P.A. 15a-16a).

Applying this policy, the Bureau has censored hundreds of publications and books mailed by publishers to prisoners. (Jt.A. 113-127). In part, this results from the Bureau's unwritten

[3]Several of the guidelines are not challenged here. These allow a warden to censor a publication if:

—"It depicts or describes procedures for the construction or use of weapons, ammunition, bombs, or incendiary devices," 28 C.F.R. §540.71(b)(1);

—"It... contains blueprints, drawings, or similar descriptions of Bureau of Prisons institutions," 28 C.F.R. §540.71(b)(1);

—"It depicts, or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs," 28 C.F.R. §540.71(b)(3); or

—"It is written in code," 28 C.F.R. §540.71(b)(4).

"all-or-nothing" rule which requires a warden to reject an entire book or publication if any portion is deemed objectionable -— whether it be a paragraph, a page, or one article among many. (P.A. 16a, 34a; Jt.A. 80-81, 100-101, 105).

Rejected books or magazines are returned to the publisher. Both the publisher and the prisoner receive a rejection notice describing the "reasons" for the warden's action and a reference to the "article or material considered to be objectionable." 28 C.F.R. §540.71(d) (P.A. 23a). If either the prisoner or publisher objects to the decision, an administrative appeal may be pursued through the Bureau of Prisons from the warden to the Regional Director to the General Counsel. 28 C.F.R. §540.71(d) (P.A. 23a) and §542.15.

In contrast to the censorship policy challenged in this action, the Bureau's rules for censorship of correspondence are relatively narrow and limited. Incoming letters are screened to determine if they contain "escape plots," "plans to commit illegal activities or to violate institutional rules," "direction of an inmate's business," material written in code, or matter that "is nonmailable under law or postal regulations." (J.L. 105). Otherwise, they are forwarded to the prisoner. Unlike books or magazines, correspondence may not be censored merely because the warden deems it "detrimental to security, good order, or discipline." Indeed, many of the censored items involved in this case could not have been banned if their contents had been contained in a letter to a prisoner.

B. The Censorship Rule In Practice

1. The Absence of Meaningful Standards

A book or publication mailed to a prisoner is delivered to the prison mailroom. The initial screening of these materials is cursory. (Jt.A. 96). If the mailroom personnel do not flag

a book or publication for further review, it is delivered to the prisoner. (Jt.A. 95-96). If the publication or book is flagged as possibly objectionable, it is referred to another employee for review. (Jt.A. 95-97).[4] That review is also cursory, typically taking only seconds or minutes. (Witkowski Dep. 11-12). Neither mailroom personnel nor the reviewing staff receive any formal training in applying the Bureau's censorship policy. (Spidle Dep. 72-73; Nave Dep. 76; Hanberry Dep. 14; Fenton Dep. 85-86, 142; Witkowski Dep. 4-5).[5] Thus the staff have little to rely on except their own personal views as to which publications are acceptable. (Nave Dep. 87, 98, 102). One mailroom worker at Lewisburg candidly admitted that she did not know what the censorship standard meant. (Spidle Dep. 65, 72-73). When asked to explain the basis for her recommendations as to which publications were questionable, she explained:

> Sex is a standard, radical is a standard. I will go out on a limb and say communism and fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

(Jt.A. 97-98). Similarly, a supervisor of education stated that his recommendations to censor sexual material were based on "personal opinion." (Nave Dep. 87, 98, 102).[6] One prison

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[4]At some prisons, the mailroom employees review magazines, but not books, for content. This means that at those prisons, all books mailed by publishers to prisoners are permitted regardless of content, while magazines are nevertheless subject to censorship. (Jt.A. 77-78).

[5]The extent of the training is revealed by one warden's comment, "if [the mailroom worker] has any brains at all, he's supposed to know if something is going to cause problems." (Fenton Dep. 86).

[6]This employee believed that sexually explicit magazines should be censored only if they contained depictions of sex "gadgets." (Nave Dep. 101-103). Other employees expressed differing views which they were permitted to use as a basis for censorship. The Atlanta warden, for ex-

censor admitted that he would no longer reject the same publication he had censored previously because of his own changing state of mind. He said:

> Each day that I work within the Bureau of Prisons I hope that I continue to grow...if I don't and I stagnate, then I probably will reject everything . . . Through the growing process, things that two years ago I would reject, today I would not reject.

(Jt.A. 111).

Not surprisingly, censorship decisions vary wildly, both between prisons, and within the same prison. This is particularly true for publications criticizing prisons and prison administrators. For example, an issue of *The Call*, a leftwing political newspaper, was censored by prison officials at Marion because it contained an article critical of the prison's "control unit." (J.L. 7). When questioned about that decision in a deposition, the warden at Marion stated, "I don't see anything in that article that is not pretty well general knowledge. So as of today, I would let it in." (Jt.A. 102-103). While the warden at Marion did not have a problem with the article, the warden at Atlanta did. (Hanberry Dep. 91-92). This inconsistency extends to the highest levels of the Bureau. Thus, the Bureau's General Counsel supported the censorship decision. (Cripe Dep. II 112-114; T. 1454-1455). By contrast, a Regional Director and the Director would have allowed the disputed issue into the prison. (Jt.A. 89; 68). More generally, *The Call* is routinely read by prisoners at Lewisburg without apparent problems. (Jt.A. 99).

The inconsistencies inherent in the Bureau's censorship scheme are also revealed in the different reactions of various

ample, felt that all publications depicting sex acts should be excluded. (Hanberry Dep. 77-80).

prison officials to *The David Kopay Story* (Bantam Books, 1977) (Respondents' Lodging; P. Exh. 83). This book, was rejected from Atlanta "because the homosexual nature of the book was not in the best interest of the orderly running of the institution." (Jt.A. 117). It was also rejected from Marion because "[it]...is used to entice and propagate the gay movement. This movement causes problems in the institution." (Jt.A. 116). However, during his deposition for this case, the warden at Marion acknowledged that he "didn't think it would cause . . . any threat to security...I saw it as no threat. There were no pictures in it. It was strictly a story." (Jt.A. 102). It was later allowed into Marion without any apparent problem. (Jt.A. 106). It was also allowed into three other maximum security prisons — Terre Haute, McNeil Island, and Leavenworth. (Jt.A. 116-117). Furthermore, the General Counsel of the Bureau acknowledged that the book did not present a "facial reason" for exclusion. (Cripe Dep. II 54-55). Nevertheless, the Regional Director for the Southwest Region said he would continue to affirm its rejection from Atlanta.[7] (McCune Dep. 47; Jt.A. 117-118).

Censorship of sexually explicit publications is treated in a similarly inconsistent fashion. In the Southeast Region, issues of *Hustler* magazine were censored from institutions ranging from maximum to minimum security. (P.Exh. 75-81; Jt.A. 53-55). During the same time period, in the North Central Region, *Hustler* was routinely read by subscribers at all prisons within that region, also ranging from minimum to maximum security without any apparent problems. (Jt.A. 60). Moreover, the magazine is sold in the prison commissary at Marion, the

[7]No evidence was introduced that the book was a threat to security or that it led to any problems at the institutions where it was permitted. The district court did not make any findings to justify censorship of this publication.

Bureau's highest security prison. (Wilkinson Dep. 17-18; Williams Dep. 101; T.1136).

One of the Regional Directors acknowledged the inconsistencies fostered by the Bureau's policy:

> I do feel that all institutions should have the same general policy to allow the same type of publications in the institution. At the present time some institutions allow the *Advocate*, the "gay" newspaper, to come in. Then the inmate is transferred to another institution, such as Terre Haute, which does not allow that publication as it is in violation of our present policy statement...[I]t is my feeling [that] we should have a united effort on the part of all institutions to come up with guidelines to allow the same publications in all institutions.

(P.Exh. 12) [admitted into evidence T.329].[8]

2. "Boilerplate" Statements of "Reasons"

Once the decision is made to exclude a particular publication, a rejection notice is prepared for the warden's signature. The warden seldom reverses a staff member's recommendation for censorship. (Fenton Dep. 88-89; Witkowski Dep. 14). Indeed, the warden does not necessarily even read any of the articles in the publication. As one warden stated:

> We don't read the articles. I'm not interested in articles and the mailroom isn't. They don't have time to read articles and I don't either.

[8]Prison officials at Atlanta reject all books and publications about electronics or amateur radio on the theory that such materials "present a threat to the good order, security, or discipline of the institution." (Jt.A. 130). Staff at other maximum security prisons take the contrary position and purchase those books for prisoner reading. (Adm. 6034).

(Jt.A. 77; *see* Williams Dep. 19).

While publications are not, by policy, rejected by title, in practice, some publications are repeatedly rejected issue after issue. (Jt.A. 113-116, 121, 123-128). The rejection notice typically consists of a pre-printed form containing boilerplate language with conclusory explanations. Thus, publications can be, and have been, rejected because they are:

—"inflammatory" (Jt.A. 113, 122);

—"glorify problem inmates" (J.L. 48; Jt.A. 113-114);

—"condone[ ] homosexuality" (Adm. 552);

—"present[ ] erroneous information" (Adm. 531; Witkowski Dep. 120-125, 130-131);

—promote "unity of inmates" (Adm. 902);

—"propaget[ ] (sic) an adversary attitude by inmates towards staff" (J.L. 46-48; *see* also J.L. 39);

—"glorify...homosexuals" (Adm. 784);

—"entice and propagate the gay movement" (Adm. 508, 674);

—contain "false and...irresponsible statements" (Adm. 740); or

—are "not suitable for release within this institution" (Adm. 949).

The district court found that reasons such as these "lack reference to the circumstances in the prison that support the warden's decision." (P.A. 33a). The Director of the Bureau agreed that the rejection notices should not utilize "boilerplate language" and should explain reasons for the rejection within the context of the institution. (T. 956-957, 982).[9]

[9]The district court found that security might be compromised if the "real reasons" were revealed. (P.A. 33a). This finding is unsupported by the record.

3. Pro Forma Administrative Appeals

The district court found that the failure of the rejection notices to provide the inmate and the publisher with the "real reasons" for the censorship could be remedied if the prisoner filed an administrative appeal since, in that event, "supplementary information" would be transmitted informally between the warden and the Regional Office or the General Counsel. (P.A. 33a). The record indicates to the contrary. A Regional Director who handles administrative appeals admitted that he "very rare[ly]" contacts the warden to check on local factors. (Henderson Dep. 24). The Bureau did not cite a single case in which censorship was justified by such "supplementary information."[10] Censorship of a publication is "rarely" reversed on administrative appeal, which is basically a review of technical form. (Cripe Dep. I 48). The General Counsel gives "very heavy deference" to the warden's opinion, and will not substitute his judgment for the warden's as to whether a publication would pose a threat to security. (Cripe Dep. I 48, 28-29).[11]

4. "All-or-Nothing" Rule

The Bureau defends the "all-or-nothing" rule — the practice of rejecting an entire book or magazine even if only one page or article is objectionable — on the ground that it does not want its employees to "laboriously" review each article in a publication. 44 Fed. Reg. 38258, col. 1-2, (June 29, 1979); (C.A. 76). The Director of the Bureau admitted that security

[10]In one year, for instance, the General Counsel consulted with local officials in approximately 13% of the appeals. (Cripe Dep. II 14-16).

[11]The General Counsel engages in a "presumption of regularity" which means that if the warden asserts that the censorship is being done to further security, good order, or discipline, that decision will not be disturbed. (Cripe Dep. I 28-29, 48, 128).

was not the basis for the policy, noting that there would be no threat to security if the prisoner were given the option of having the offending pages deleted and then receiving the rest of the publication. (Jt.A. 68, 41, 100-101; *see* T. 167, 392-393, 452-453, 623-624).

5. Lack of Harm

The district court found that some publications "can present a security threat." (P.A. 31a). Respondents do not contest that general conclusion and agree that publications containing certain materials can be censored for valid security reasons. *See e.g.*, n.3, *supra*. Throughout this fifteen-year litigation, however, petitioners have been unable to cite a single incident in which a threat to security was linked to a publication received by a federal prisoner.[12] John Conrad, the Bureau's former Director of Research, explained:

> . . . [P]ublications have — from a vast amount of experience that has accumulated in operating correctional institutions — publications have very little influence, if any, in actions prejudicial to discipline. And consequently I would prefer to have a very limited list of prohibitions.

(Jt.A. 26). The petitioners' only outside corrections expert acknowledged that he, too, knew of no instance in which an article in a publication read by a prisoner resulted in an adverse incident. (T. 1251.16).[13]

[12]Witkowski Dep. 114, 121-122, 163; Hanberry Dep. 77-78, 94; Todd Dep. 7-8, 26, 32, 37, 45; Williams Dep. 68-70, 140; T. 1054, 1062-1063; Benson Dep. 36-37.

[13]A former official of the Bureau acknowledged that there was a positive impact in the prisons from the introduction of sexually explicit magazines. (Day Dep. 108-109).

C. Proceedings Below

The district court rejected a facial attack on the regulations, upholding them as necessary to prevent prisoners from reading "potentially disruptive" materials. (P.A. 31a). The rejection of the 46 specific items was upheld *en masse*, without a finding that any of the censored reading matter posed a threat to security if read by prisoners. (P.A. 30a-31a). Indeed, no such finding would have been possible on the record in this case, as indicated by an illustrative list of censored publications.[14]

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[14](1) *WIN Magazine*, a pacifist political periodical (J.L. 52-88), was rejected from Leavenworth on the ground that one article about the Bureau's prison industries program "depicts, describes, or encourages activities which may lead to use of physical violence or group disruption." (J.L. 52). The Regional Director acknowledged at trial that although the article was "critical" of the Federal Prison Industries program, that "in itself" was not enough to censor it, and therefore the publication should be allowed into all federal prisons in the region, including Marion, Terre Haute, and Leavenworth. (Jt.A. 61-62). The district court made no findings with regard to the censorship of this concededly unobjectionable publication.

(2) *The 1979 Peace Calendar: While There is a Soul in Prison* (P. Exh. 29; J.L. 22-36 [excerpts]) was censored at Atlanta on the ground that "it encourages prison strikes." (J.L. 21). The district court stated simply that the *Peace Calendar* contained a "rather intellectual set of 'statements on the prison experience'." (P.A. 29a, n.5). The court did not make a finding that the calendar presented a threat to security or otherwise explain why its censorship was permitted.

(3) *The Guardian*, a leftwing political newspaper (J.L. 37-38), was rejected from Marion because the publication "promoted the formation of prisoner unions and promotes an adversary attitude toward staff." (Jt.A. 118-119). The censorship was upheld on appeal. (J.L. 39). The employees who censored it testified that, in fact, it was not detrimental to security. (Jt. A. 106, 71-72). The district court failed to make any findings justifying the censorship of this publication.

(4) *The Labyrinth*, a leftwing prisoner-oriented periodical (J.L. 13-20), was censored from Atlanta because it was "inflammatory" (Jt. A. 122), and from Marion because it contained an article critical of prison medical

The district court accepted the proposition that prison wardens are entitled to "wide discretion" in content-based censorship pursuant to a "generalized" regulation and, in effect, that those decisions are not subject to judicial review.

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care entitled "Medical Murder." (Jt.A. 123). The article reported two deaths in federal prisons and two in a state prison, and concluded that the prisoners, although sentenced to terms, were "in fact sentenced to death and [were] ***murdered by neglect.***" (original emphasis). Many of the allegations in this article are set out, for any prisoner who uses the prison law library, in *Green v. Carlson*, 581 F.2d 669, 670-671 (7th Cir. 1978), and *Carlson v. Green*, 446 U.S. 14, 16 n.1 (1980); *see also Green v. Carlson*, 826 F.2d 647, 653-654 (7th Cir. 1987) (dissenting opinion). The rejection notice stated that "this type of philosophy could guide inmates in this institution into situations which could cause themselves and other inmates problems with the medical staff." (J.L. 12; Jt.A. 123). The warden at Marion later testified that he disagreed with the censorship of this publication (Jt.A. 104), and the Regional Director also testified that the issue was acceptable. (Henderson Dep. 74-76). It was also acceptable at Lewisburg. (Jt.A. 92; *see also* Jt.A. 7-8). The district court made no finding about this publication nor did it otherwise explain why its censorship was justified.

(5) *Workers World*, a weekly newspaper of the Workers World Party (J.L. 89-91), was censored on the ground that it "supports the gay rights of inmates and rebellion and boycotting by inmates as a legitimate means of achieving goals." (J.L. 92; Jt.A. 126-127). The General Counsel, who had affirmed this censorship on appeal, acknowledged in a deposition that there was nothing in the publication that supported the reasons given for its censorship, and there was no portion of it that he could identify as objectionable. (Cripe Dep. II 95-96; Jt.A. 72). The district court did not make a finding that this newspaper was a threat to prison security or otherwise make any findings about this publication.

(6) Numerous issues of *The Militant* were rejected from Atlanta, Terre Haute, and Marion. (Jt.A. 123-124). Those rejections were upheld by the Regional Director. (Jt.A. 123). Later, as a result of an out-of-court settlement of a lawsuit brought by the publisher, the censorship decisions were reversed. The Regional Director changed his position and admitted that the censored issues did not contain any articles "detrimental to security..." (J.L. 43-45; Jt.A. 124-125). The district court made no findings justifying the censorship of any of those issues.

(P.A. 31a-32a). The court also upheld the "all-or-nothing" rule. The court stated, without record support (*see* II.B., *infra*), that the alternative practice of deleting only the objectional material at the prisoner's request would cause "prisoner discontent." (P.A. 34a). The district court purportedly based its conclusions on *Pell v. Procunier*, 417 U.S. 817 (1974), but did not explain how it applied *Pell* to reach its conclusions. (P.A. 46a-47a).

On appeal, the District of Columbia Circuit initially addressed the appropriate standard of review. Noting that this case involved a claim of content-based discrimination affecting the First Amendment rights of nonprisoners, as well as prisoners, the circuit court declined to consider this as a "pure" prisoners' rights case. On that basis, it distinguished this Court's recent decision in *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987), and the earlier precedents on which *Turner* was based. *See e.g., Pell v. Procunier, supra; Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); and *Bell v. Wolfish*, 441 U.S. 520 (1979). Instead, the Court held that restraints on the ability of prisoners and nonprisoners to communicate with each other must be judged according to the standard articulated in *Procunier v. Martinez*.

Applying *Martinez* to the facial validity of the regulations, the court of appeals concluded that *Martinez* required "a causal nexus between expression and proscribed conduct" and therefore held that if publications were found to "encourage" violence or other breaches of security, the regulation "could survive the *Martinez* test." (P.A. 14a). At the same time, the court determined that regulations banning material that was deemed "detrimental to security, good order, or discipline," that "might facilitate criminal activity," or that merely "depicts," "describes," or "instructs in" prohibited activities, "permit[ted] a far looser causal nexus" than *Martinez* would allow. (P.A. 15a-16a). The Court also held that the practice of rejecting an entire publication when only a portion was deemed objectionable, failed to meet the overbreadth portion of the *Martinez* test. (P.A. 17a).

In addition, the circuit court reversed the district court's decision to review the censored items as a group. "[T]he rejections should have been addressed individually and none upheld unless consistent with *Martinez*." (P.A. 20a-21a). Although it resisted this conclusion below, the Bureau now concedes that the court of appeals correctly remanded the case to the district court for individualized review of each publication under whatever standard of review this Court decides is appropriate. (Pet. Brief 30).[15]

SUMMARY OF ARGUMENT

This case presents a limited challenge to the Bureau of Prison's content-based and viewpoint-based censorship of books, magazines, and newspapers sent through the mail to individual federal prisoners.

Respondents do not dispute that some publications may be censored for valid security reasons — for example, those containing blueprints of a prison or instructions for the manufacture or use of drugs, keys, ammunition or weapons, or advocacy of violence that is likely to result in violence. Nor do respondents dispute the Bureau's right to impose reasonable time, place and manner restrictions on the receipt of publications. *See e.g., Bell v. Wolfish*, 441 U.S. 520 (1979). There

[15]The court of appeals decided that because some of the censorship occurred as early as 1977, and there was evidence at the 1981 trial that the Bureau had changed its opinion as to at least some of the material, the district court should determine in the first instance "whether and to what extent [the] individual rejections are moot." (P.A. 21a)

also is no issue of prisoners' associational rights, the receipt of bulk mailings of publications for in-prison distribution, or any other issue of within-prison or prisoner-to-prisoner communication. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) and *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987).

Rather, this case involves the right of prisoners to read books and periodicals, and the right of publishers to communicate with prisoners through their publications. In that sense, it is not a "prisoners' rights" case; it is a case involving a "consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners" but whose interests are "inextricably meshed" with their subscribers who are prisoners. *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

Viewed in its proper context, this case is controlled by the holding in *Martinez*, that prison censorship "must further an important or substantial governmental interest unrelated to the suppression of expression," and that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U.S. at 413. The "reasonableness standard" articulated most recently in *Turner* is not applicable because the First Amendment rights of non-prisoners are at stake.

Contrary to petitioners' claim, *Martinez* does not impose "strict scrutiny" on prison decisions. The *Martinez* Court carefully charted a middle course between the strict scrutiny standard used in First Amendment cases outside the prison context, and the completely deferential, "hands-off posture" adopted by some lower courts in early prison cases. In making this choice, the Court recognized the significant First

Amendment interests of civilians in corresponding with prisoners.

This case involves an equally weighty civilian interest: freedom of the press. The Bureau's argument that publications sent to prisoners deserve less First Amendment protection than letters stands the First Amendment on its head and ignores the place of press freedom in our constitutional order. Moreover, the in-prison activity that is contemplated — i.e. reading one's mail — is substantially the same whether the mail consists of letters or newspapers. In view of these similarities, the *Martinez* standard is fully applicable, as most federal courts have held both before and after *Turner*.

The *Martinez* test gives proper weight to the judgments of prison staff by recognizing the government's legitimate interests in security, order and rehabilitation. Prison officials are not required to show "with certainty" that adverse consequences would flow from the failure to censor. *Martinez* also recognizes the exigencies of the prison environment by giving prison officials the extraordinary authority of imposing a prior restraint without affirmatively seeking judicial review; the burden of seeking review remains with the prisoner or publisher. *Compare, Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611 (June 17, 1988). Experience in the lower courts shows that the *Martinez* standard is quite capable of distinguishing between cases in which censorship serves a legitimate purpose and those in which it amounts to an imposition of the censor's personal views.

The *Martinez* test is also applicable to this case because the Bureau's censorship scheme, like the censorship rules in *Martinez*, is neither content-neutral nor viewpoint-neutral. On their face, the regulations call for content-based review of publica-

tions; in practice, the materials are censored because they present viewpoints that are unorthodox, unpopular, and usually are critical of prison officials and other governmental authorities. Such content-based censorship has always been subjected to close scrutiny by this Court. To permit official censorship on no more than a showing of "reasonableness" would provide insufficient protection to the First Amendment interests involved.

Petitioners cannot avoid the *Martinez* test by labeling prisons as a "nonpublic forum" subject only to a reasonableness standard. The prisoners here seek only to read their mail, not to assemble, picket, organize, or make speeches. Likewise, respondents do not seek access to some specialized service or forum, such as an internal mail or message system or a newspaper produced in the prison. The Court's nonpublic forum cases, therefore, have no applicability. Even if they did, the prerequisites for applying a reasonableness standard are absent from this case: the censorship scheme is not viewpoint-neutral, there are no alternative channels for communication of the censored material, and reading books and periodicals is not "basically incompatible with the normal activity" of a prison. *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

The Bureau's censorship scheme displays many of the same evils condemned in *Martinez*. The regulations fail to spell out explicitly the types of materials that are prohibited. In particular, the catchall "standard" allowing a warden to ban material he deems "detrimental to security, good order or discipline...or [that] might facilitate criminal activity" has been used, as in *Martinez*, to "eliminate unflattering or unwelcome opinions" and "to apply [the censor's] own personal prejudices and opinions.." 416 U.S. at 413-415. Using this standard Bureau staff have censored books and periodicals that they now acknowledge did not threaten prison security.

The censorship scheme, as applied, also fails to provide adequate reasons for particular censorship decisions. The publications are typically condemned because they are "inflammatory," or "present[ ] erroneous information," or express a disagreeable "philosophy." What is most often lacking is any information about exactly what in the publication is objectionable. As this Court has often noted in reviewing licensing schemes, reasonable specificity is required to "ensure constitutional decision-making . . . [and] provide a solid foun. tion for eventual judicial review." *City of Lakewood*, 56 U.S.L.W. at 4617. The court of appeals correctly found that the conclusory reasons provided by petitioners in this case did not "constitute[ ] a reasoned determination that the material encouraged [threatening] conduct..." (P.A. 20a).

The Bureau's "all or nothing" rule, under which a periodical is rejected in its entirety if any portion is objectionable, is similarly overbroad. The district court erred in stating that the practice was justified by a security concern that the alternative of deleting the objectionable portions and permitting the prisoner to read the rest would create more "discontent." The Director of the Bureau disavowed any security objection to deleting the offending portion and permitting the prisoner to read the rest. In light of that concession, the court of appeals correctly found that the restriction was not "generally necessary" to protect any legitimate governmental interest.

The final error committed by the district court was its failure to exercise judicial review over individual censorship decisions. It upheld the censorship policies, and then in one sweeping stroke sustained the censorship of all the books and publications without making a finding that any of the specific items posed a threat to prison security. The failure to make individualized findings violated a settled principle of First Amendment jurisprudence. A court must make an independent,

judicial judgment as to each censored item. *Jacobellis v. State of Ohio*, 378 U.S. (1964). The Bureau now belatedly acknowledges that the court of appeals correctly remanded the case to the district court for an individualized ruling on the censorship of each publication. (Pet. Brief 30).

ARGUMENT

I. *PROCUNIER V. MARTINEZ* PROVIDES THE APPROPRIATE STANDARD OF REVIEW IN THIS CASE.

A. Unlike *Turner v. Safley* This Case Involves Freedom Of The Press And Therefore The First Amendment Rights Of Nonprisoners.

This is not a "prisoners' rights" case. This case involves the rights of nonprisoners-publishers — to engage in written communication through the mail with individual subscribers in federal prisons. Because the rights of specific publishers are "inextricably meshed" with the rights of their prisoner subscribers, this case should be governed by the standard of review set forth in *Martinez*, and not the reasonableness test of *Turner*.

1. *Procunier v. Martinez* Has Continuing Vitality

In *Turner*, the Court held that prison regulations may be upheld under a reasonableness test notwithstanding their impact on the constitutional rights of prison inmates. 107 S.Ct. 2254 (1987). That holding did not, however, overrule this court's decision in *Martinez*. To the contrary, the *Turner* Court affirmatively cited *Martinez*, noting that *Martinez* struck down a "content-based regulation on the First Amendment rights

of those who are not prisoners." *Id.* at 2260. (emphasis added). The Court specifically explained that:

> Our holding [in *Martinez*] therefore turned on the fact that the challenged regulation caused a consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners.

When this Court analyzed the restriction on prisoner-to-prisoner correspondence at issue in *Turner* it applied a reasonableness test since the regulation in question exclusively affected the rights of inmates. However, when evaluating the restriction on inmate marriages, also challenged in *Turner*, the Court's approach was different. Writing for a unanimous Court on this point, Justice O'Connor noted that the regulation impinged on the rights of civilians, and therefore "[a]lthough not urged by respondents, this implication of the interests of nonprisoners may support application of the *Martinez* standard." *Id.* at 2266. Ultimately, the Court did not decide that question because the marriage regulation could not withstand scrutiny even under the reasonable relationship test.

Martinez therefore has continuing vitality and provides the appropriate standard of review where a content-based prison regulation works a "consequential restriction" on the First Amendment rights of nonprisoners who seek to engage in individualized written communication with prisoners.

2. Publishers Have Important Interests At Stake

Petitioners assert that a publisher does not have a "particularized interest" in communicating with a prisoner. (Pet. Brief 21). This claim is both irrelevant and incorrect.

This Court has never cited the alleged absence of such an interest on the part of a publisher or bookseller as justifying

a restriction on press freedom or free speech rights.[16] More generally, the Court has rejected the notion that the importance of speech and the degree of its constitutional protection are determined by the identity of the sender or the source of the communication. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 at 777, 785 (1978). Thus, if a nonprisoner correspondent has a constitutionally protected interest "against unjustified governmental interference with the intended communication," *Martinez*, 416 U.S. at 409, so too does a publisher.[17]

In addition to being legally irrelevant, Petitioners' argument is wrong on the facts. Each of the publishers has received an individual order or subscription from a prisoner and seeks to communicate its written message (usually on a matter of public affairs) to the intended recipient. Therefore, like the correspondents in *Martinez*, the publishers here have interests that are "inextricably meshed" with those of their prisoner subscribers. 416 U.S. at 409.

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[16]The Court's observation in *Martinez* that "[d]ifferent considerations may come into play in the case of mass mailings," 416 U.S. at 408, n.11, has little relevance here. The filling of individual subscriptions and orders by publishers is not properly characterized as a "mass mailing."

Moreover, the term "mass mailing" is more akin to the "bulk mailings" at issue in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 130-131 and nn.7-8. In *Jones*, the prisoners sought to receive prisoners' union publications in bundles for in-prison redistribution in connection with organizational and associational activities. In upholding a prohibition on such bulk mailings, the *Jones* Court was careful to note that "individual mailings to individual inmates" were permitted. *Id.* at n.8. Respondents here do not seek the right to send or receive bulk mailings of publications.

[17]Indeed, *Martinez* itself did not distinguish among types of civilian correspondents; its standard applies equally to family members, lifelong friends, strangers, recently acquired "pen pals," and organizations that correspond with prisoners for humanitarian reasons.

It would stand the First Amendment on its head to argue that it affords fewer protections to the press than to private correspondents. The history of the First Amendment makes it clear that the Founders' primary concern was to abolish restrictions on public discourse, with particular reference to newspapers and other publications addressing political and social issues of public concern.[18] *See generally*, Z. Chafee, *Free Speech in the United States* at 18-20 (1941).

Furthermore, it is now beyond dispute that the First Amendment protects not only the right "to distribute literature" but also "the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *accord, Bantam Books v. Sullivan*, 372 U.S. 58, 64 n.6 (1963); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J. concurring); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Board of Education, Island Trees Union School District No. 26 v. Pico*, 457 U.S. 853, 912 (1982) (Rehnquist, J., dissenting).

To claim that a publisher has less "at stake" (Pet. Brief 13) than an individual correspondent when its audience is restricted by government edict simply ignores the "special

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[18]As the Court has stated:"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . The Constitution specifically selected the press, which includes not only newspapers, books and magazines, but also humble leaflets and circulars (citations omitted)...to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). *See Hustler Magazine v. Falwell*, ___ U.S. ___, 108 S.Ct. 876, 879 (1988).

Most of the censored materials in this case involve matters of public affairs. Many are critical of the criminal justice and penal systems, *see The Guardian* [political newspaper (J.L. 37)] or *The Labyrinth* [magazine critical of prison administration and prison medical care (J.L. 13-20)], or discuss controversial views on social matters. *See The David Kopay Story*, autobiography of a homosexual football player. (Respondents' Lodging; P. Exh. 83).

and constitutionally recognized role [of the press]." *Bellotti*, 435 U.S. at 781. This Court has never upheld a prohibition or limitation on speech because it only affected part of the audience for the speech. For example, it would not have helped the State of Maryland in defending its film censorship practices to have argued that the film could still be distributed in 49 other states and the rest of the world. *See Freedman v. Maryland*, 380 U.S. 51 (1965) (film review board); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (protecting right of individual addressee to receive a publication).

Thus, the Bureau's argument that censorship has "merely" an "incidental impact" on the press (Pet. Brief 13) is based on a false premise that subscribers are a fungible commodity. It implies that a publisher does not have a constitutionally protected interest in communicating with each individual subscriber. In a constitutional system designed to protect *individual* rights, it is hardly surprising that petitioners have been unable to point to a single decision in support of their novel interpretation of the First Amendment. *See Brooks v. Seiter*, 779 F.2d 1177, 1180-1181 (6th Cir. 1985).

Moreover, petitioners' distinction between publishers and correspondents does not withstand scrutiny even on its own terms. A correspondent barred from writing to a prisoner could convey the communication to someone else who was not in prison as easily as a publisher could. Contrary to petitioners' claim, if the communication were of a uniquely personal nature, the correspondent generally would have other alternatives available, including personal visits and telephone calls. *See* respectively 28 C.F.R. §§540.100 *et seq.*, and §§540.40 *et seq.* A publisher, on the other hand, has no other practical way of accomplishing the attempted communication with its prison subscriber.[19]

[19]*Pell v. Procunier*, 417 U.S. 817, 825-826 (1974) upheld the Bureau's ban on face-to-face interviews between reporters and prisoners, relying in part, upon the fact that alternative methods of communication were available, including correspondence.

Given the "special" status of the press under our Constitution, and the far-reaching consequences of censorship on the press, it would be destructive of First Amendment freedoms to deny to publishers the same scrutiny of censorship decisions that is appropriately provided to other civilian members of the public under the *Martinez* test. Indeed, each of the nine other circuits that have considered this issue, whether before or after *Turner*, have concluded or assumed that *Martinez* supplies the controlling standard for content-based censorship of books, periodicals, and newspapers mailed to prisoners.[20]

[20]The nine circuits are as follows: **First Circuit:** *Dooley v. Quick*, 598 F.Supp. 607 (D.R.I. 1984), aff'd 787 F.2d 579 (1986) (officials must follow *Martinez* guidelines); **Second Circuit:** *Morgan v. LaVallee*, 526 F.2d 221 (1975) (holding complaint sufficiently alleged violation of prisoner's right to receive publication citing *Martinez*); **Fourth Circuit:** *Hopkins v. Collins*, 411 F.Supp. 831 (D.Md. 1976) aff'd in rel. part 548 F.2d 503 (1977) (striking down prison publication rejection under *Martinez*); **Fifth Circuit:** *Guajardo v. Estelle*, 580 F.2d 748 (1978) (follows *Martinez* in prohibiting prison officials from censoring publications critical of their penal philosophy and their activities); **Sixth Circuit:** *Brooks v. Seiter*, 779 F.2d 1177 (1985) (prisoners stated a claim under *Martinez* where officials prohibited them from receiving certain mail order publications); **Seventh Circuit:** *Aikens v. Jenkins*, 534 F.2d 751 (1976) (finding censorship regulations overbroad under *Martinez*); **Eighth Circuit:** *Valiant-Bey v. Morris*, 829 F.2d 1441 (1987) (utilizing *Martinez*, reversed dismissal of claim that religious publications were intercepted and confiscated by prison officials); *Murphy v. Missouri Department of Corrections*, 814 F.2d 1252 (1987) (finding prison mail policies that operated as a total ban on white supremacist material overly restrictive under *Martinez*); **Ninth Circuit:** *Pepperling v. Crist*, 678 F.2d 787 (1982) (follows *Martinez* in prohibiting prison officials from censoring publications critical of prison authorities); **Eleventh Circuit:** *Lawson v. Dugger*, 840 F.2d 781 (1987), reh. den. 840 F.2d 779 (1988) (striking down prison prohibition on the receipt of religious literature under *Martinez*), petition for *cert.* filed May 26, 1988, *Dugger v. Lawson*, #87-1994.

Petitioners cite *Mann v. Smith*, 796 F.2d 79 (5th Cir. 1986) and *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986) as cases which apply a reasonable-

B. The *Martinez* Test Is A Balanced One That Requires A District Court To Consider The Government's Legitimate Interestes In Prison Security, Order, Discipline, And Rehabilitation.

Petitioners claim that *Martinez* gives insufficient deference to the judgments of prison staff. By its own terms, however, *Martinez* charted a middle course between the strict scrutiny test used in a nonprison context, 416 U.S. at 406-407, and the completely deferential "hands-off" doctrine adopted by some lower courts in prison cases. *Id.* at 408.

Thus, *Martinez* specifically recognizes the "substantial governmental interests [in] security, order and rehabilitation." 416 U.S. at 413. It acknowledges that a prison official cannot be expected to predict "with certainty" the adverse consequences that are likely to flow from printed material. 416 U.S. at 414. And it grants prison wardens the extraordinary power of imposing a prior restraint on written expression. *Compare, Freedman v. Maryland*, 380 U.S. 51 (1965); *City of Lakewood*, 56 U.S.L.W. 4611 (1988). Accordingly, under *Martinez*, a warden may turn away a book or publication and place the burden of filing an appeal on the publisher or prisoner after the censorship has occurred. 416 U.S. at 417-419.

Recognizing the latitude afforded by the *Martinez* test, the Bureau itself endorsed the *Martinez* test during the trial of this case, urging its use by the district court in its Proposed

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ness test. (Pet. Brief 27). Both of these jail cases are distinguishable. In both, the courts were faced with a blanket ban on the receipt and possession of published materials; in both, the regulation was defended on fire safety grounds, and the prevention of clogged plumbing. Citing *Bell v. Wolfish*, the regulations were struck down as an "exaggerated response." In neither case was the court of appeals faced with content-based censorship.

Findings of Fact and Conclusions of Law. (Jt.A. 133). In addition, the Justice Department has referred to *Martinez* as the governing law in challenges to state prison censorship rules. (P. Exh. 72) [admitted into evidence T. 1150Z].

Over the past fourteen years the lower federal courts have had extensive experience applying *Martinez* to prison censorship of publications. Contrary to the Petitioners' assertion, there simply is no evidence that application of *Martinez* has resulted in the entry of publications "that may lead to serious safety and security problems." (Pet. Brief 13). In fact, a survey of the recent case law indicates several instances in which courts have upheld prison censorship under the standards announced in *Martinez*.[21]

In *Vodicka v. Phelps*, 624 F.2d 569 (5th Cir. 1980), a regulation barring the reading by prisoners of publications that constituted an "immediate threat to the security of the institution" was upheld under *Martinez* both on its face and as applied to a newsletter that commented approvingly of a prior inmate work stoppage. *Id.* at 570-575. *Accord, Espinoza v.*

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[21]Nonetheless, the Petitioners predict dire consequences for prison security from use of the *Martinez* standard, referring to four of the 46 publications and books as having a "potential for disruptive effect." (Pet. Brief 26). But the petitioners acknowledge that the question of the "perceived dangers presented by each" of the publications must "clearly" be resolved by the district court on remand. (Pet. Brief 30-31). At that point, the district court, applying *Martinez*, could decide to exclude one or more of these publications. Respondents' experts, for example, agreed that articles in two white supremacist publications might be censored under certain circumstances. (Jt.A. 12-13, 20-21, 27-28).

With regard to *Hustler* magazine, cited by the Bureau, as a security threat (Pet. Brief 26), it is noteworthy that that magazine is routinely received by federal prisoners in maximum security prisons, and even sold in the prison commissary at Marion without apparent problems. (Jt.A. 101; Wilkinson Dep. 10-11; Williams Dep. 101).

Wilson, 814 F.2d 1093 (6th Cir. 1987) (ban on reading of homosexual publication upheld on security grounds); *Travis v. Norris*, 805 F.2d 806 (8th Cir. 1986) (ban on publication entitled "Gorilla [sic] Law" upheld because it advocated violence); *Carpenter v. State of South Dakota*, 536 F.2d 759 (8th Cir. 1976) (exclusion of sexually explicit material). *See also Meadows v. Hopkins*, 713 F.2d 206 (6th Cir. 1983) (upholding regulations under *Martinez*). It is apparent therefore, that, contrary to the Bureau's claim, *Martinez* does not create an "insurmountable" burden for prison administrators. (Pet. Brief 13).

C. This Case Involves The Sort Of Content-Based Judgments That Have Always Triggered The Court's Close Scrutiny To Ensure That Subjective Opinions Are Not Utilized To Suppress Unwelcome Criticism.

In sustaining the restriction on prisoner-to-prisoner correspondence, this Court in *Turner* emphasized that the regulation was "content-neutral" both on its face and as applied:

> We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion without regard to the content of the expression. . . .

____U.S. ____, 107 S.Ct. at 2262.

Similarly, in *Pell v. Procunier* the Court emphasized that the rule limiting face-to-face interviews between reporters and inmates was applied in a "neutral fashion" and "no discrimination in terms of content is involved." 417 U.S. at 828. And in *Bell v. Wolfish*, when the Court upheld a ban on hardcover books unless they were mailed directly from a publisher, bookstore or bookclub, the Court noted that the rule operated

in "a neutral fashion, without regard to the content of the expression." 441 U.S. at 551.

These holdings are consistent with the oft-expressed principle that restrictions on expression are most likely to be upheld "...provided that they are justified without reference to the content of the regulated speech . . . ." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In this case, the Petitioners concede that its policy is not content-neutral. (Pet. Brief in Court of Appeals 43). No other conclusion is possible. By its own terms, the policy requires a case-by-case evaluation of the content of each publiation and an assessment of the predicted impact of that publication in prison security. *See Boos v. Barry*, ____U.S.____, 108 S.Ct. 1157, 1164 (1988).

Even in a prison context, there is a need for "sensitive tools" to achieve a system of regulation that avoids suppressing speech "...because of disagreement with the message." *Clark, supra*, at 295. The standard of review that best satisfies that need in this case is the one enunciated in *Martinez*. Faced in *Martinez* with a "content-based regulation on the First Amendment rights of those who are not prisoners," *Turner* at 2260, this Court applied mid-level scrutiny to safeguard those rights by requiring that the restrictions be "necessary" or "essential" to further a legitimate governmental interest unrelated to the suppression of expression. *Id.* at 2258. Thus, the *Martinez* standard recognizes that deference to the judgment of prison officials cannot be absolute. Where the free speech rights of outsiders are concerned, a prison official's discretion must be limited by the need to protect those interests. This is because prison administrators, by virtue of their role, tend not to think in constitutional terms. (Fenton Dep. 79). Accordingly, a decision to censor prison mail on the

basis of its content, whether it is personal correspondence or publications, requires that it be evaluated under an intermediate standard of review, in order to prevent idiosyncratic, personal, or arbitrary decisions.

D. The Bureau's Censorship Policy Cannot Be Justified By The Prison's Status As A Nonpublic Forum.

The Bureau claims that applying *Martinez* to publishers would be inconsistent with this Court's decisions involving expression in nonpublic forums and that the court of appeals "erroneously treated prisons as if they were public forums." (Pet. Brief 22).

We agree that a prison is a nonpublic forum. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977). But this Court's nonpublic forum decisions are not applicable here for four reasons. First, the relevant forum in this case is not the prison but the United States mail. Second, the Bureau's policy on its face and as applied is viewpoint-based. Third, there are no alternative channels available to a publisher to communicate its message to a particular subscriber if the publication is censored. Finally, reading publications mailed individually to prisoners is an activity that is not "basically incompatible" with a prison environment.

1. This Is Not a Nonpublic Forum Case

The Court's "nonpublic forum" holdings are not applicable here because the relevant forum is not the prison but the mail. In defining a forum this Court looks to the "particular channel of communication...[it focuses] on the access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). Here the publisher respondents seek only to mail their publications, and the prisoner respondents seek only to receive and to read their mail.

The mail is a traditional forum that is open to all.[22]

> The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .

Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) quoting *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (footnote omitted). *Accord, Blount v. Rizzi*, 400 U.S. 410, 416 (1971).

By contrast, the Court's nonpublic forum cases involve more than the passive act of reading one's mail. Some of them involve restrictions on assembly, leafletting, and other face-to-face communications. Thus, in *Jones*, the activities being restricted consisted of "group activity. . . in the nature of a functioning organization," including solicitation, group meetings, and the receipt of "bulk mailing" of newsletters for redistribution inside the prison. *Jones, supra*, at 129-139. In *Greer v. Spock*, 424 U.S. 828 (1976) the Court upheld a ban on political meetings and leafletting on a military base.

In another line of nonpublic forum cases, the "forum" in question was a specialized service provided by government, such as an internal public mail system, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S.

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[22] *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114 (1981) is not to the contrary. There, the Court upheld statutory restrictions upon the placement of non-mailed matter in authorized postal depositories, but carefully noted, "We are . . . not confronted with a regulation which in any way restricts the appellees' right to use the mails." *Id.* at 127.

37 (1983), an in-house fund-raising drive aimed at federal employees, *Cornelius*, 473 U.S. 788 (1985), and a high school newspaper funded by school authorities and used for educational purposes. *Hazelwood School District v. Kuhlmeier*, ____U.S.____, 108 S.Ct. 562 (1988). No such service is at issue here.

If the prisoner-respondents sought to distribute publications to other prisoners as in *Jones*, or have meetings to discuss them, or read them aloud from a soapbox in the prison yard, the case would be different. It would also be different if they sought to challenge censorship of an in-prison newspaper.[23] But that is not this case. All respondents seek to do is read their mail. The fact that a prisoner resides in a prison and must receive mail there does not turn the mail into a nonpublic forum.

2. The Bureau's Regulations are Not Viewpoint Neutral

Even if this case were treated as a nonpublic forum case, petitioner's regulations do not pass muster because they are not viewpoint-neutral.

In general, access to a nonpublic forum may be regulated under a reasonableness standard as long as officials do not try to suppress expression because they disagree with it. *Perry*, 460 U.S. at 46. Reasonable subject matter distinctions may be made so long as they are viewpoint neutral, but even a facially reasonable restriction will not be upheld if it is "in reality a facade for viewpoint based discrimination." *Cornelius*, 473 U.S. at 811. Indeed, the "principle of viewpoint neutrality . . . underlies the First Amendment itself . . . " *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984).

[23]*See Pittman v. Hutto*, 594 F.2d 407 (4th Cir. 1979) (applying standard of *Jones*, to censorship of a prisoner-produced newspaper).

The undisputed evidence shows that Bureau officials utilize their discretion to suppress "unwelcome criticism," *Martinez* at 415, and unpopular or unconventional viewpoints. As one mailroom employee stated:

> Sex is a standard, radical is a standard. I will go out on a limb and say communism and fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

(Jt.A. 97-98). Bureau officials acknowledged that they screen and censor publications based on nothing more tangible than their own "personal opinion[s]." (Nave Dep. 87). Even the stated "reasons" for rejection indicate that prison staff often censor materials because they personally disagree with the viewpoint of the materials: e.g. "entice and propogate(sic) the gay movement" (Adm. 508, 674), "promotes an adversary attitude among inmates towards staff" (J.L. 39), "presents erroneous information" (Adm. 531; Witkowski Dep. 120-131), contains "allegations of police brutality" (Adm. 888), or contains "false and irresponsible statements." (Adm. 740).

Examination of the rejected materials reveals that they are highly critical of prison officials or other law enforcement or government authorities, c promote ideas not in conformity with conventional views. The excluded materials are not *Time*, *Newsweek* or *Readers' Digest* nor even *The New Republic* or *National Review*. They do include *Soledad Brother: The Prison Letters of George Jackson* (P.Exh. 16) [admitted into evidence T.329]; *The Call* (J.L. 6-11); *The 1979 Peace Calendar: While There is a Soul in Prison* (J.L. 22-36); *Workers World*, (J.L. 89-99); *Join Hands* (P.Exh. 22; C.A. 156-163).[24]

[24]The Bureau claims that its regulation is not "viewpoint based" because it "expressly provide[s]" (Pet. Brief 24), that the "warden may not reject a publication *solely* because its content is religious, philosophical, political, social or sexual or because its content is unpopular or repugnant."

there is some interest unrelated to speech that justifies this silencing. *See City of Lakewood*, 56 U.S.L.W. at 4615. To put it another way, the question is whether "the manner of expression is *basically incompatible* with the normal activity of a particular place at a particular time." *Grayned v. Rockford*, 408 U.S. 104, 116 (1972); *City of Lakewood, supra*, at 4615 (emphasis added).

While admittedly a prison is a nonpublic forum and not hospitable to associational rights, *see Jones, Pell,* and *Block v. Rutherford*, 468 U.S. 576 (1984), in *Martinez*, this Court, by extending broad protections to prisoner correspondence, acknowledged that the activity of reading is not inherently incompatible with that forum or with a person's status as a prisoner.

The Bureau's publications policy confirms the proposition that reading in prison is a positive activity with few accompanying security concerns. The Bureau policy allows an inmate to subscribe to and receive publications without prior approval by prison officials. 28 C.F.R. §540.70(a). The provision of prison libraries also indicates the Bureau's view that reading in prison generally is not an activity freighted with threats to security. The Petitioners note, ". . . with the exception of those specific publications that are determined to pose a danger to a particular institution at a particular time, *publishers are free to send their publications to federal inmates.*" (Pet. Brief 21, citing 28 C.F.R. §540.70(a) [emphasis added]). In contrast, face-to-face visits must be approved in advance by prison officials. 28 C.F.R. §540.51. This important difference reflects the far more sensitive security concerns posed by face-to-face visiting, a crucial distinction noted by this Court in justifying enhanced deference to prison officials on issues affecting associational rights. *Pell*, 417 U.S at 826. The fact that the vast majority of publications currently are

Given the potential for viewpoint-based judgments inherent in this censorship policy, it is essential to scrutinize the regulation on its face *and as applied* to ensure that prison officials do not use their legitimate regulatory powers to "disapprove of . . . idea[s] for partisan or political reasons." *Board of Education, Island Trees Union School District No. 26 v. Pico*, 457 U.S. 853, 879 (Blackmun, J., concurring) (1982). The court below required nothing more.

3. Lack of Substantial Alternative Channels

In each of the other "forum" cases where this Court has upheld restrictions on expression, the plaintiff had "substantial alternative channels that remain[ed] open," for accomplishing the attempted communication. *See e.g., Perry*, 460 U.S. at 53; *Clark*, 468 U.S. at 295; *Cornelius*, 473 U.S. at 809. By contrast, if a publication is censored, there is no practical alternative means by which the publisher can transmit the censored information to the prisoner subscriber. Under these circumstances, the result cannot be described as a "reasonable time, place and manner" restriction; rather, it represents a total prohibition on communication.[25]

4. Reading is Not "Basically Incompatible With The Normal Activity" of a Prison

Even if the Bureau's policy were viewpoint neutral, and an alternative means of communication existed, it still would not be a reasonable time, place and manner restriction. The issue in evaluating a complete prohibition of expression is whether

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Of course, that does not completely bar a warden from considering a publication's viewpoint in making his censorship decisions.

[25]As noted *supra*, a friend or family member with a personal message may convey it in a visit or a telephone call. This is not a practical option for most book or newspaper publishers.

being allowed into federal prisons (Pet. Brief 26, n.11), underscores the basic compatibility of reading with the prison environment.

Because the passive activity of readir.g individually mailed material, whether it is personal correspondence or periodicals, is not "basically incompatible" with the "activity of a prison," the Bureau's regulations and particular censorship decisions should be evaluated with at least the same degree of scrutiny applied to correspondence from civilians, the rule of *Martinez*.

E. Analysis of This Court's Prison Cases Supports Application of the *Martinez* Test.

The Bureau claims that this Court's post-*Martinez* decisions "refute the court of appeals' apparent assumption that an impact on outsiders, however indirect, triggers strict scrutiny review." (Pet. Brief at 21). This misstates respondents' claims and the court of appeals' decision.[26]

The Petitioners argue that *Block v. Rutherford*, 468 U.S. 576 (1984), *Pell*, and *O'Lone v. Estate of Shabazz*, ____U.S. ____, 107 S.Ct. 2400 (1987), each of which used a "reasonable relationship" test, involved regulations that had an impact on outsiders. They fail to note, however, that in each of those cases the issue was the physical entry of outsiders into the prison, as compared with the reading of printed materials mailed by outside publishers. In *Pell*, the Court found this distinction to be decisive:

> In *Procunier v. Martinez, supra* we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on *written communication by inmates*. When, however,

[26]We contend, as noted *supra*, at I.A.2, that the censorship regulation, as applied here, has a substantial, consequential impact on nonprisoners.

> the question involves the *entry of people into prisons for face-to-face communication* with inmates, it is obvious that institutional considerations, such as security and related administrative problems . . . require that some limitations be placed on such visitations.

417 U.S. at 826 (emphasis added).

Petitioners also argue that the court of appeals distinction between "expression of ideas on paper" and "conduct qua expression" finds no support in this Court's decisions, claiming that several post-*Martinez* decisions using a "reasonable relationship" test also dealt with restrictions involving "expression of ideas on paper." (Pet. Cert. Brief 13). But none of those post-*Martinez* cases — *Turner*, *Bell* and *Jones* — dealt with content-based censorship of individually mailed written expressions from outsiders.

In *Turner*, the Court expressly noted that the restriction on prisoner-to-prisoner correspondence was a content-neutral rule. 107 S.Ct. at 2264. Similarly, *Bell v. Wolfish* upheld a content-neutral rule designed to limit the flow of contraband via incoming parcels. 441 U.S. at 551. The perceived danger stemmed not from the content of the writings but from the potential for the introduction of physical contraband secreted in the book itself. Finally, *Jones v. North Carolina Prisoners' Labor Union* dealt with a restriction on bulk mailings for later redistribution in the prison; the Court specifically noted that prisoners could continue to receive individually mailed copies of the Union's literature, 433 U.S. at 131, n.8. The Court also emphasized that the case did not concern "questions of the First Amendment rights of inmates or outsiders" since there was no issue before the Court of interference with "correspondence of outsiders and individual inmates." *Id.* Indeed, in *Jones* the Court specifically noted that ". . . First Amendment speech rights are barely implicated. . ." *Id.* at 130.

II. AS CONSTRUED BY THE DISTRICT COURT, THE *TURNER* STANDARD IS INADEQUATE TO PROTECT THE FIRST AMENDMENT INTERESTS AT STAKE IN THIS CASE.

Applying the reasonableness standard, the district court reached a decision that is inconsistent with settled First Amendment principles on at least three grounds. First, it upheld a censorship scheme that is vague, overbroad, and procedurally inadequate. Second, it permitted the Bureau to ban books and magazines in their entirety when the only articulated objection was to isolated passages or individual articles. Third, it failed in its duty to consider each censored item individually. For the reasons described more fully below, the court of appeals correctly rejected both the district court's reasoning and its result.[27]

[27]Respondents contend that the challenged policies and practices could not withstand examination even under a "reasonableness" standard. That is because they are not content-neutral, 107 U.S. at 2262; there are no alternative means of exercising the right available to inmates, and there is an "obvious, easy" alternative to the Bureau's vague and overbroad policies, namely, the more narrowly tailored policy governing correspondence, which fully accommodates the Bureau's security needs. (J.L. 105). Finally, the record clearly demonstrates that most of the specific censorship decisions were an "exaggerated response" to security concerns. *Id.* *See* Statement of the Case at Section B., *supra*.

A. The District Court Erroneously Upheld A Vague, Overbroad, And Procedurally Inadequate Censorship Scheme That "Fairly Invited Prison Officials To Apply Their Own Personal Prejudices and Opinions" And Led To The Censorship Of Materials Protected By The First Amendment.

1. The General Censorship Standard Is Vague and Overbroad

In upholding a regulation that provides a warden with open-ended discretion to reject any publication that he or she believes is "detrimental to security, good order or discipline . . . or might facilitate criminal activity," the district court endorsed a standard that contains some of the same flaws condemned in *Martinez*. The regulation struck down in *Martinez* allowed prison officials to reject correspondence if it contained "inflammatory political, racial, religious, or other views," and a catchall that allowed rejection of correspondence that was deemed "otherwise inappropriate." 416 U.S. at 415. Noting that the standard "fairly invited" prison officials "to apply their own personal prejudices and opinions as standards for censorship," *id.*, the Court found that such "broad restrictions" were unnecessary to further any governmental interest unrelated to the suppression of expression.[28]

[28]This Court has "long been sensitive to the special dangers inherent in a law placing unbridled discretion . . . in the hands of a governmental official," *City of Lakewood*, 56 U.S.L.W. at 4616. The Court has acknowledged that "express standards are needed," especially in the free speech area, to

> provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it dif-

"Not surprisingly," the Court observed, wardens had used the wide discretion allowed by the regulations "to apply their own personal prejudices and opinions. . ." and that the regulations "invited" them ". . .to suppress unwelcome criticism. . ." 416 U.S. at 415.

The censorship policy challenged in this case allows prison officials the same type of "extraordinary latitude for discretion" decried in *Martinez* and has led to the same results. Bureau officials censor publications based on nothing more than their own opinions (Nave Dep. at 98, 87, 102), suppressing material because they think it presents "erroneous information" (Adm. 531; Witkowski Dep. 120-125, 130-131), contains "false and irresponsible statements" (Adm. 740), because they think it is "slanted" (Williams Dep. 121), because it "tends to raise issues which may or may not be true" (Carlson Dep. 75), or to improve a prisoner's "attitude or philosophy" (Williams Dep. 77-78). The Court need look no further than the Bureau's suppression of criticism of its medical care program,[29] and its prison industries program[30] to see that here, as in *Martinez*, prison officials "apply their own personal prejudices and opinions . . . [and] suppress unwelcome criticism." 416 U.S. at 415.[31]

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ficult . . . to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression.

Id. at 4616 (1988).

[29]*See* Medical Murder" article in *Labyrinth* (J.L. 12, 18; Jt.A. 122-123); *compare*, *Green v. Carlson*, 581 F.2d 669, 670-71 (7th Cir. 1978), aff'd, *Carlson v. Green*, 446 U.S. 14 (1980).

[30]*See* Slave Labor in America's Prisons" (J.L. 54-58); *Compare* with J. Mitford, *Kind and Usual Punishment* at ch. 11 (1973).

[31]Prison censorship regulations virtually identical to the Bureau's have been held invalid by the lower courts. *Hopkins v. Collins*, 411 F.Supp. 831, (D. Md. 1976), aff'd in rel. part, mod. on other grnds., 548 F.2d 503 (4th Cir. 1977); *Aikens v. Jenkins*, 534 F.2d 751, 757 (7th Cir. 1976).

2. The Illustrative Guidelines Are Also Vague and Overbroad

The illustrative guidelines in the policy do not cure the ambiguities and overbreadth of the general standard because the guidelines themselves are non-exhaustive, as well as vague and overbroad in their own right. Those guidelines were aptly described by the district court as a "generalized description of excludable publications" (P.A. 29a) that did not "appreciably limit" a warden's "wide discretion." (P.A. 31a). The district court nonetheless upheld them as "reasonable" under the *Pell* standard. *Id.*[32]

The court of appeals reversed, in part, holding that the guidelines allowing censorship of reading material that merely "depict" or "describe" "fall short" of the requirement of *Martinez* that there be a "causal nexus" between the expression and proscribed conduct. (P.A. 16a).[33] The court of appeals was clearly correct. The first criterion — "depicts or . . . describes methods of escape. . ." — was acknowledged by Bureau staff to allow rejection of otherwise unobjectionable material. Thus, this criterion fails to distinguish between materials that might reasonably encourage a specific escape attempt and those that are general knowledge such as *Papillon*,[34] a book the Bureau conceded was not harmful, and yet, could have been censored under this standard. (Henderson Dep. 20-22; *see also* T. 150, 379, 437, 546, 611).

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[32]The district court did not rule expressly on each of respondents' claims of vagueness and overbreadth but held generally that the censorship system was "reasonable." (P.A. 32a).

[33]The court of appeals sustained those portions of the guidelines that allowed exclusion of a publication if the warden found that it would "encourage" violence; "that regulation could survive the minimum *Martinez* test." (P.A. 14a). Respondents have not sought review of that holding.

[34]This book is an autobiography containing detailed descriptions of successful escapes from various prisons including Devil's Island.

The second criterion — "depicts, or describes . . . activities which may lead to the use of physical violence or group disruption" — also is too broad. It was used, for example, to censor an issue of *WIN Magazine* that contained an article critical of the Leavenworth prison industries programs. (J.L. 54-58).[35] It could be used to justify censorship of graphic descriptions of crimes reported in daily newspapers if a warden asserted that they "describe activities" that "may lead" to "physical violence." (*See also*, T. 151, 380-381, 611).

The third criterion — "instructs in the commission of criminal activity" — was acknowledged by prison officials to allow censorship of otherwise acceptable material such as Agatha Christie mysteries or newspaper stories that describe in detail the commission of a crime. (T. 1431; *see* T. 153).[36]

3. The District Court Erroneously Upheld Vague And Conclusory 'Reasons' For Censorship

This Court has required a statement of reasons in many contexts where government deprives an individual of protected interests. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (imposition of prison discipline); *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972) (parole denial). In the First Amendment context, a statement of reasons is essential to "ensure constitutional decision making" and to provide a "solid foundation for eventual judicial review." *City of Lakewood*, 56 U.S.L.W. at 4617.

> A reasons requirement promotes thought by the decision maker, focuses attention on the relevant points and further protects against arbitrary and capricious decisions grounded upon impermissible or erroneous considerations.

Jackson v. Ward, 458 F.Supp 546 at 565 (W.D.N.Y. 1978) (paraphrased in part from *Dunlop v. Bachowski*, 421 U.S. 560 (1975)). Vague, general or conclusory statements are of little value for these purposes; a "degree of specificity" is required. *City of Lakewood, supra*, at 4617.

Bureau decisions to censor are justified in most cases by boilerplate "reasons" which convey little useful information. They are vague, overbroad and fail to establish the causal link to the legitimate governmental interests of security, good order and discipline required by *Martinez*. Some of these rote, conclusory reasons are:

—"inflammatory" (Jt.A. 113, 122);

—"glorify problem inmates" (Adm. 535-542; J.L. 46-48; Jt.A. 114);

—"have a tendency to develop an adversary attitude toward staff . . . this type of attitude is detrimental to the good orderly running of this institution." (Adm. 578, 785, 802, 904; *see* J.L. 39);

—"This philosophy guides individual inmates into situations which can cause themselves and other inmates problems with the posted regulations of this institution. . ." (Jt.A. 125-127);

—"presents erroneous information" (Adm. 531).

A court (or a prison official) reviewing such statements of reasons would be at a loss to determine exactly what material was objected to, why it was objected to, or what untoward consequences were expected had the recipient been permitted to read the publication.[37]

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[35]At trial prison staff acknowledged that the publication was unobjectionable. (Jt.A. 61-62).

[36]Several lower courts have invalidated similar criteria. *Aikens v. Jenkins*, 534 F.2d at 757; *Hopkins v. Collins*, 548 F.2d at 504; *Cofone v. Manson*, 409 F.Supp. 1033, 1040-1041 (D. Conn. 1976).

[37]The district court, in its discussion of petitioners' statement of reasons claim, missed a good part of the point. It acknowledged that many of the

In order to focus a censor's inquiry on the actual content of the publication and on whether its content falls into a category prohibited by a valid regulation, and to permit effective review in both administrative and judicial forums, the Court should require the Bureau to give a "brief statement of the reasons, in meaningful language, specifying the offending portion if less than the entire publication is objectionable." *Jackson v. Ward*, 458 F.Supp. at 565. "It is not enough that the rejection notice recite the applicable criterion." *Cofone v. Manson*, 409 F.Supp. at 1041, n.21. Rather, the notice must state with specificity what it is about the publication that is objectionable.[38]

The court of appeals was correct, therefore, in finding that the explanations given did not provide "a reasoned determination that the material encouraged conduct which would constitute or otherwise was likely to produce, a breach of security or order or an impairment of rehabilitation." (P.A. 20a). The First Amendment requires no less.

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statements "lack reference to the circumstances in the prison that support the warden's decision" and that the "failure to refer to institutional conditions makes the written decisions less easily reviewable." (P.A. 33a). But it upheld the statements because it felt it would be dangerous to tell the inmate the "real" reasons since that "could expose weaknesses in prison security to exploitation by inmates." *Id.*

In most cases, valid reasons for censorship will be based not on "circumstances in the prison" but on material in the ***publication*** that violates valid and narrowly drawn censorship regulations. If, for example, a publication contains information on how to pick locks or brew alcohol or advocates violence against prison staff or inmates, it is easy enough to say so, and abundantly clear from the material itself why the publication may be censored. Such matter is censorable regardless of "circumstances in the prison." The notion that censorship decisions generally are based on particular circumstances in particular prisons is unsupported by the record. Petitioners could not cite even a single case in which censorship was based on particular events or conditions at a particular prison. Clearly, censorship in the Bureau is based on the content of the publications; the wild variation in decisions between institutions (See Statement of the Case at Section B., *supra)*, reflects variations in the censors' subjective views and not in prison conditions.

[38]The Director of the Bureau admitted that the rejection notices should not utilize "boilerplate language." (T. 982).

B. The District Court Erroneously Upheld the "All-or-Nothing" Rule.

The court of appeals correctly held that the practice of rejecting an entire book or publication when the only objection was to a page or an article was not "generally necessary" to protect the legitimate "governmental interest involved in the portion properly rejected." (P.A. 16a). *Accord, Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982).

The district court stated, erroneously, that the Bureau defended this practice on security grounds. (P.A. 34a). The court upheld the practice as "reasonably related" to security because the alternative suggested by respondents' experts of deleting the offending material and providing the rest to the prisoner "would cause more discontent." *Id.* This conclusion is completely unsupported by the record.[39] In any event, deleting the offending portion would not increase discontent, because the prisoner could be given the option of having the entire publication rejected or receiving the unobjectionable portions. (*See* T. 167, 392-393, 452-453, 623-624). Indeed, Direc-

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[39]The Court stated that one of plaintiffs' experts concurred that deleting the objectionable material would "create more discontent than the current practice." (P.A. 34a). The Court apparently was referring to the testimony of John Conrad, the former Director of Research for the Bureau. (T. 393). Examination of the transcript indicates, however, that while Mr. Conrad did not "like" deleting the offending page or article he felt "that's the best of the bad solutions which are available. . . But I don't see any way out of it. I'd rather do that than exclude the publication entirely just on the basis of one offending passage." *Id.* He did not in fact state that deleting the material would create more "discontent."

tor Carlson specifically admitted that there was no security risk presented by deleting the offending page or article and permitting the prisoner to read the rest.[40]

In actuality, the Bureau's defense of the "all-or-nothing" rule rests on the familiar ground of administrative convenience. According to the Bureau, it is too burdensome to review "laboriously" each article in a publication. 44 Fed. Reg. 38258 col. 1-2 (June 29, 1979); (C.A. 76).[41] The Petitioners' statistics do not bear out that claim. Current practice has led to censorship of fewer than 2000 items per year (Pet. Brief 26, n.11), or in other words, approximately one publication per week at each of the Bureau's 45 prison facilities; and this number should be substantially reduced by an appropriate narrowing of the censorship guidelines.[42] (Jt.A. 41).

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[40]Jt.A. 68, 41; *see* Jt.A. 100-101. Plaintiffs' experts concurred. T.167, 392-393, 452-453, 623-624.

[41]This notion, that an article may be censored without even being read by the censor is, to our knowledge, unique in American jurisprudence.

[42]Other large prison systems have not found it necessary to resort to an "all-or-nothing" rule. In New York State, for example, the relevant regulation provides that a prisoner may

> [r]eceive the publication with the objectionable matter removed or blotted out. This option shall be available only if the objectionable portions of the publication constitute eight or fewer individual pages or if they constitute a single chapter, article or section of any length. This option need not be made available if the publication is in a form other than a book, magazine, or newspaper, and if removing or blotting out portions would present physical difficulties.

N.Y.S. Directive 4572 at 5 (reprinted in *Amicus* brief submitted by Correctional Association of New York). *See also Hernandez v. Estelle* 788 F.2d. 1154, 1157 (5th Cir. 1986) (describing Texas Department of Corrections' policy of "clipping" out offensive portions and delivering the remainder to prisoner; the policy was developed in response to *Guajardo v. Estelle*, 580 F.2d. 748, 761 (5th Cir. 1978) (only "portions" may be censored).

Even if true, petitioners' administrative convenience argument is entitled to little weight in a First Amendment context. As this Court noted in *Martinez*, an administrative regulation or practice touching on First Amendment rights of non-prisoners must be "narrowly drawn to reach only material that might be thought to encourage violence. . . A restriction that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* at 413, 417.

In short, petitioners' practice of discarding an entire book or publication when only a small portion is objectionable represents the constitutional equivalent of "throwing out the baby with the bathwater."[43]

C. The District Court Erroneously Declined To Exercise Judicial Review Over Individual Censorship Decisions.

The court of appeals correctly concluded that the district court erred when it made only "generalized conclusions," upholding censorship *en masse*, and failed to "deal individually with the rejected publications." (P.A. 20a). The panel concluded that prison officials "have the burden of showing that a rejection of a publication is at least 'generally necessary to protect one or more of the legitimate governmental interests

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[43]Even if a "reasonableness" standard is applied, this practice cannot be sustained under *Turner*. As noted above, the practice does not have a "logical connection" to any legitimate governmental interest in security. There also is no alternative means for inmates to exercise the right to read the unobjectionable material since the reading matter is excluded, and there is no "significant ripple" effect on fellow inmates or staff in allowing the inmate to receive the rest of the publication. Finally, there is a "ready alternative" that fully accommodates the rights at stake at *de minimis* cost to valid penological interests, namely, deleting the objectionable portion and providing the rest to the prisoner. 107 S.Ct. at 2262.

. . .' of security, order or rehabilitation. *Martinez*, 416 U.S. at 414 . . . It follows that the rejections should have been addressed *individually* and none upheld unless consistent with *Martinez*." (P.A. 21a) (emphasis added).

In the court of appeals the Bureau conceded that the district court did not make "a *de novo* content-based review of each publication" but claimed that such a review was not necessary. (Pet. Brief in Court of Appeals 43). Now, for the first time, the petitioners acknowledge that whatever standard of review is ultimately applied, "clearly" a remand is required for individualized findings. (Pet. Brief 30). The petitioners correctly note that the censorship of each item "involves factual issues as to the nature of each of the publications, the perceived dangers presented by each, and even whether there continues to be a live controversy with respect to particular publications." *Id.* 30-31.

This concession is consistent with the settled principle that in all free expression cases a court "cannot avoid making an *independent* constitutional judgment on the facts of the case as to whether the material is constitutionally protected." *Jacobellis v. State of Ohio*, 378 U.S. 184, 190 (1964) (emphasis added).[44]

[44]The lower federal courts have followed this approach. See *Pepperling v. Crist*, 678 F.2d at 791 ("close examination of the magazine" required to determine dangerousness or obscenity); *Morgan v. LaVallee*, 526 F.2d at 224-225 ("close examination of the publication in question" required).

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded to the district court for further consideration under the standard enunciated in *Procunier v. Martinez*.

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